SERVICE DATE – JUNE 2, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34844

PYCO INDUSTRIES, INC.–FEEDER LINE ACQUISITION–
SOUTH PLAINS SWITCHING, LTD. CO.

Decided: June 1, 2006

On May 5, 2006, PYCO Industries, Inc. (PYCO), a processor and shipper of cottonseed oil and related products, filed an application under 49 U.S.C. 10907 and 49 CFR 1151 to acquire all of the rail lines of South Plains Switching, Ltd. Co. (SAW). In the alternative, PYCO seeks to acquire a portion of SAW's rail lines that would allow PYCO to provide rail service to itself and to two other shippers located in close proximity to one of PYCO's two plants in Lubbock, TX. The request to purchase all of SAW's rail lines is called the "All-SAW" option and the alternative request to purchase a portion of SAW's lines is referred to as "Alternative Two."[1] Under either option, PYCO also seeks to acquire trackage rights over the main line of BNSF Railway Company (BNSF)[2] to reach a nearby BNSF yard. PYCO included in its application requests for discovery from both SAW and BNSF and for issuance of a protective order to preserve the confidentiality of information that might be submitted in the future.

In a pleading filed on May 15, 2006, SAW asked for a determination that a feeder line application does not preclude going forward with private negotiations for the purchase of SAW's

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[1] PYCO describes the rail lines it seeks to acquire under Alternative Two as follows:

Track 5, SAW yard,	2,400 feet;
Track 1, SAW yard,	2,100 feet;
Track 9200,	3,900 feet;
Track 9298, east of BNSF main,	4,320 feet;
Track lead to PYCO plant 2 to 50th St.,	6,280 feet;
Track 231 lead to 9200/9298,	960 feet;
Track 310 through Farmers 1,	5,600 feet
TOTAL:	25,560 feet

In addition, PYCO seeks to acquire all of Track No. 6 from the western end of SAW yard to the western clearpoint of the easternmost switch of the "wye" track connecting to Track No. 6 from the south, and also the western branch of said "wye" from its southern clearpoint north to and including its connection with Track No. 6, estimated to be 1,100 feet. Also, PYCO would acquire a crossing right as follows: Crossing right Track 9298 to and through SAW yard, 5,000 feet.

[2] BNSF Railway Company formerly was named The Burlington Northern and Santa Fe Railway Company. This decision will refer to both entities as BNSF.

lines by a different entity, which would require Board approval under 49 U.S.C. 10901 or 10902, and to hold this feeder line application in abeyance pending that approval. PYCO filed a pleading in opposition to those requests on May 19, 2006.

On May 16, 2006, SAW filed a request to reject the application as to Alternative Two on the ground that the proposed purchase of less than "a particular line of railroad" is not allowed under the feeder line provision. PYCO filed a pleading in opposition to this request on May 18, 2006.

SAW filed a suggested procedural schedule on May 18, 2006. PYCO filed a reply and asked for a more expedited schedule in a pleading filed May 22, 2006.

On May 26, 2006, US Rail Partners, Ltd. (USRP) sought leave to file the verified statement of its president.

The application will be rejected as incomplete, under the Board's regulations, for either the All-SAW option or for Alternative Two. The rejection is without prejudice to PYCO's filing a new application containing the necessary information.

BACKGROUND

In 1999, SAW purchased approximately 14.1 miles of rail lines in Lubbock, TX, from BNSF.[3] PYCO, whose only rail service was provided by SAW, experienced a substantial, measurable deterioration in SAW's service in 2005. This led the Board to issue, under 49 U.S.C. 11123 and 49 CFR part 1146, an alternative service order authorizing West Texas & Lubbock Railway Company, Inc. (WTL), to provide service to PYCO, over SAW's lines, for an initial period of 30 days. PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (STB served Jan. 26, 2006). In response to that order, the parties agreed to an operating protocol, to which the Board ordered amendments in a decision served on February 16, 2006. In a further decision served in that proceeding on February 24, 2006, the Board continued WTL's alternative service to PYCO for another 120 days.[4] SAW has continued to provide rail service to the other shippers on its lines. All of the traffic that SAW handles is received from or delivered to BNSF, the only rail carrier with which SAW connects.

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[3] See South Plains Switching, Ltd. Co.—Acquisition Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33753 (STB served July 15, 1999). According to PYCO, since that acquisition, SAW has removed approximately 1,500 feet of the track it purchased and has constructed an additional 5,290 feet of track.

[4] The decisions served on January 26, February 16, and February 24, 2006, are referred to collectively as "the alternative service orders." Under the latest decision, alternative service will expire on June 25, 2006. SAW has asked the Board to terminate alternative service. PYCO has asked to continue that service at least until the current expiration date, and indicated in this proceeding that it will request extension of the alternative service to the statutory maximum of 270 days.

In this proceeding, PYCO seeks authority to obtain SAW's lines under 49 U.S.C. 10907, a forced sale provision of the Interstate Commerce Act called the Feeder Railroad Development Program.[5] As the ICC has noted, "[t]he program provides shipper groups and communities with an alternative to inadequate rail service or abandonment and gives them an opportunity to preserve feeder lines prior to their abandonment or possible downgrading. To accomplish this, the statute authorizes [the Board] to require railroads to sell certain rail lines under specific circumstances to financially responsible applicants." Cheney R. Co.–Feeder Line Acq., 5 I.C.C.2d 250, 251 (1989).

Under 49 CFR 1151.2(b), the Board, through the Director of the Office of Proceedings, must accept a complete feeder line application, or reject one that is incomplete, no later than 30 days after the application is filed.[6]

As relevant here, under 49 U.S.C. 10907(b)(1)(A)(i) and 49 CFR 1151.3(a)(11)(i), the Board is authorized to require the sale of a rail line to a financially responsible person if the public convenience and necessity (PC&N) permit or require the sale.[7] PYCO contends that the proposed sale is required or permitted under the PC&N criteria, 49 U.S.C. 10907(c)(1)(A)-(E), and that it is a financially responsible person willing to pay not less than the line's constitutional minimum value.

PRELIMINARY ISSUES

The Board's rejection of PYCO's feeder line application in its entirety for the reasons discussed below will render moot: PYCO's requests for a protective order and suggestion of a procedural schedule; and SAW's requests for a determination that the feeder line application does not preclude its going forward with private negotiations for a sale of SAW's lines, and its requests to hold the feeder line application in abeyance pending approval of such a sale under 49

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[5] Congress used this title when it originally enacted the provision as section 401 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. When Congress reenacted the provision in section 102 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 83, it entitled the provision, "Railroad development." Because the original title is used in the Board's regulations and in Board and Interstate Commerce Commission (ICC) precedent, it is used here.

[6] There is also a third option under 49 CFR 1151.2(d)—conditional acceptance of the application—when the applicant is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier and the applicant files with the application a request for discovery to obtain the needed information. As discussed below, this is not that sort of case.

[7] A different provision, 49 U.S.C. 10907(b)(1)(A)(ii), allows the Board to require the sale when the owning rail carrier has identified the rail line as potentially subject to a future application to abandon the line.

U.S.C. 10901 or 10902, to reject the application as to Alternative Two for failure to purchase all of "a particular line of railroad," and suggestion of a procedural schedule.

Because no party will be harmed and it will lead to a more complete record, USRP's request for leave to file the verified statement of its president will be granted and the statement will be made part of the record.

DISCUSSION AND CONCLUSIONS

A feeder line application must include the information set forth at 49 CFR 1151.3(a). PYCO includes information pertaining to all of the criteria in that subsection, but there are serious omissions in some of the information PYCO has provided, as discussed below.

Financial Responsibility (1151.3(a)(3)). An application must include information sufficient to demonstrate that the applicant is a financially responsible person, able to pay the higher of the net liquidation value (NLV) or going concern value (GCV) of the line and to cover expenses associated with providing services over the line for at least the first 3 years after acquisition of the line.

PYCO states that Co-Bank of Denver, CO, will provide loan funding sufficient to pay a value greater than the estimated NLV[8] of $2,094,000 plus operating capital. PYCO includes a letter from Co-Bank supposedly attesting to this. Co-Bank's letter, however, states only that the bank is the primary lender for PYCO and that "PYCO has the financial resources to devote as much as $5,000,000 towards rail acquisition and operation." These statements do not constitute either a loan commitment to PYCO or an assurance that PYCO has sufficient available cash to acquire and operate SAW's rail lines for at least the first 3 years. Thus, the application is not complete on this issue.

PC&N Criteria (1151.3(a)(11)). An application under the PC&N standard must contain detailed evidence that permits the Board to find:

> (A) The rail carrier operating the line refused within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over the line;
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> (B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;
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> (C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;

[8] The feeder line provision of the statute requires the applicant to pay the constitutional minimum value for a rail line, defined as the greater of the line's NLV or GCV. For both the All-SAW option and Alternative Two, PYCO estimates the NLV to be greater than the GCV.

(D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and

(E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

PYCO relies on the Board's earlier findings in the alternative service orders that PYCO experienced a measurable deterioration in the quality of its rail service and that SAW has not shown a willingness to restore adequate service to PYCO. PYCO buttressed those findings with the statement of its consignee, Penny-Newman Grain, attesting to SAW's inadequate service to PYCO. This evidence is adequate to show that SAW provided inadequate rail service to PYCO.

Nonetheless, the information provided by PYCO is inadequate to go forward with either the All-Saw option or Alternative Two. Regarding the All-SAW option, evidence is lacking to show that the majority of shippers on the line experienced inadequate service from SAW or that a majority of the shippers asked SAW to improve its service to them. PYCO has not provided information regarding the number of shippers on the line, which clearly is needed to determine whether a majority of the shippers that use SAW's lines have received inadequate service, as required by both the statute at 49 U.S.C. 10907(c)(1)(B) and the Board's regulations. While, in some cases, only the owning rail carrier would know the shippers it serves and discovery tendered with the application would be necessary to complete an application, that is not the case here.[9] PYCO's application thus is deficient for failing to list the number of shippers receiving SAW's service.

PYCO has shown that one other current shipper and one potential shipper experienced inadequate service from SAW. The general manager of Hi-Plains Bag and Bagging (HPBB), which receives several inbound rail shipments per month through SAW's rail service, described deficiencies in SAW's service to HPBB and stated that it supported the sale of all of SAW's lines to PYCO under the feeder line provision. Floyd Trucking Company, a potential shipper located next to one of SAW's rail lines, stated that it has been unable to obtain rail service from

[9] The record in the alternative service orders proceeding reveals that recently there were at least 19 identified shippers receiving rail service from SAW, including PYCO. As a party, PYCO clearly has access to the evidence in that proceeding. In addition, all of SAW's lines are located in a tightly configured industrial area in Lubbock and it would not be difficult to determine all of the shippers who recently used or could use SAW's service.

SAW on reasonable terms despite several attempts, and therefore showed that SAW's service was inadequate.[10]

The four other shippers and two consignees that provided statements supporting PYCO's application, however, do not state that they received inadequate service from SAW, even though they support PYCO's feeder line application. One of those shippers also opined that SAW had provided inadequate service to PYCO, but not as to itself. General support for PYCO's application, without a statement of experiencing inadequate service from the incumbent rail carrier, does not meet the requirements of the feeder line statute. As this is not the type of information solely in SAW's possession, discovery would not provide a cure. Thus, the application is deficient under the All-SAW option for lack of evidence that a majority of SAW's shippers experienced inadequate rail service.

Turning to Alternative Two, PYCO identified all of the shippers on the relevant portion of SAW's lines: itself, Attebury Grain, and Farmers Cooperative Compress (Farmers). Of these three, however, only PYCO stated that it had received inadequate rail service from SAW. Two consignees of Farmers indicated support for PYCO's application, but did not state that Farmers received inadequate rail service. Again, PYCO's evidence does not meet the required showing of inadequate service to a majority of the shippers on this portion of SAW's lines, and discovery would not cure the deficiency in the evidence.

Regarding both options, PYCO argues that the "majority of shippers" language in the statute should be read to encompass the "majority of shippers by volume." But the statutory language is clear: to grant a feeder line application, the Board must make a finding that the owning carrier's service is inadequate for a majority of *shippers*, not a majority of the traffic by volume, shipments, carloadings, or the like. Accordingly, PYCO's argument is without merit. Once again, discovery would not remedy this deficiency because only shippers or consignees can attest to the quality of service that SAW has been providing to them.

The elements pertaining to SAW's finances and its overall operational performance logically do not apply to the All-SAW option because there would be no remainder rail system to examine for financial and operational viability. To apply these criteria would prevent the use of the feeder line provision to purchase an entire small railroad, which by definition is a "feeder line," and there is no indication that Congress wished to exclude such purchases. Thus, PYCO needed only to include a showing that, under Alternative Two, the remainder of SAW's system would be viable both financially and operationally. PYCO's showing in that regard was sufficient.

[10] In <u>Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between LaHarpe and Hollis, IL</u>, STB Finance Docket No. 34335 (STB served Oct. 28, 2004), the Board accepted the support of potential shippers who formerly used the owning carrier's rail service but ceased using that service because it was inadequate and too costly.

As to the final element, PYCO states that, because rail service to PYCO improved markedly under WTL's alternative service, PYCO expects that all shippers to be served by either WTL or a different carrier (under either the All-SAW option or Alternative Two) similarly would experience dramatic improvements in their rail service. That statement is pure speculation concerning the majority of shippers on SAW's lines under either option because a majority did not state that they had experienced inadequate service from SAW.

In summary, for both the All-SAW option and Alternative Two, PYCO has not made a sufficient showing as to all of the required elements of a feeder line application. These deficiencies would not be cured by obtaining discovery of information in SAW's possession. Therefore the application cannot be conditionally accepted but must instead be rejected. However, this rejection is without prejudice to PYCO filing a new feeder line application should it be able to provide the evidence and information that are lacking here.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. USRP is granted leave to file the verified statement of its president.

2. PYCO's feeder line application is rejected without prejudice to filing a new application containing the required information.

3. PYCO's request for issuance of a protective order and suggestion of a procedural schedule are dismissed as moot.

4. SAW's requests for a determination that a feeder line application does not preclude its going forward with negotiations for a sale to another entity; to hold this feeder line application in abeyance pending approval of such a sale under 49 U.S.C. 10901 or 10902; to reject the application for Alternative Two on the ground that it proposes purchase of less than "a particular line of railroad," and suggestion of a procedural schedule are dismissed as moot.

5. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary